witness may not refuse to testify because his testimony may bring disgrace upon him.[13] And as to the last question, such statutes have been generally upheld in this country on the ground that they are acts of amnesty, and within the powers of Congress.[14]

In the recent case of *Ex parte Muncy* (Tex.), 163 S. W. 29, the district attorney, under the authority of a Texas statute,[15] and with the consent of the district judge, guaranteed a witness immunity from prosecution and punishment for any matter about which he might testify in regard to a homicide. The Court of Criminal Appeals held, with a vigorous dissent by one judge, that the witness was guilty of contempt in refusing to testify under these circumstances.[16] The decision in this case seems to be sound, and is undoubtedly in line with the opinions of the majority of the courts. In the first place, the witness was promised immunity by the district attorney, and this in itself was sufficient to protect him fully from prosecution without regard to any statute, according to the better view,[17] although there is some authority *contra*.[18] In the second place, the statute gives the witness complete immunity from prosecution or punishment by its very terms, and with such exoneration he may be compelled to testify, according to the better view and the weight of authority.[19] Nor need the transaction be in the nature of a contract between the witness and the State, as was argued in the dissenting opinion, because the statute was enacted for the express purpose of forcing witnesses to testify in such cases.[20]

NEGOTIABILITY OF MORTGAGES SECURING NEGOTIABLE PAPER.—No principle of law is better settled than that the transfer of a debt

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[13] Moline Wagon Co. *v.* Preston, 35 Ill. App. 358; In re Kelly, 200 Pa. St. 430, 50 Atl. 248; Kendrick *v.* Commonwealth, 78 Va. 490. In delivering the opinion in the last case, Judge Fauntleroy said: "A witness who is called upon by the Commonwealth to testify as to violations of her laws, within his observation, may always assert his constitutional privilege and immunity from prosecution and punishment for his own implication in the unlawful act as to which he is compelled to testify; but the courts of Virginia will not recognize the Spartan morality which deprecates not the perpetration, but only the exposure of the crime."

[14] State *v.* Nowell, 58 N. H. 314; Ex parte Cohen, *supra*. See also, People *v.* Sharp, 107 N. Y. 427, 14 N. E. 319.

[15] The statute provides: "Any court, officer or tribunal having jurisdiction of the offenses enumerated in this chapter, or any district or county attorney may subpœna persons and compel their attendance as witnesses to testify as to violations of any of the provisions of the foregoing articles. Any persons so summoned and examined shall not be liable to prosecution for any violation of said articles about which he may testify."

[16] Section 10, of the Bill of Rights, contains the usual provision against self-incrimination.

[17] In re Taylor, 8 Misc. 159, 28 N. Y. Supp. 500.

[18] Muller *v.* State, 11 Lea (Tenn.) 18.

[19] See cases cited in footnote 9, *supra*.

[20] Griffin *v.* State, 43 Tex. Cr. Rep. 428, 66 S. W. 782.

will operate to carry with it any security incident to the debt. *A fortiori* is this true where the transfer is effected through the assignment or endorsement of some written evidence of the debt, such written evidence being secured by a specific charge or lien, such as a mortgage, upon the property of the debtor. But the rights of the transferee in any given case will be determined largely by the nature of the writing to which the contract of indebtedness has been reduced. If such instrument be negotiable, then the principles of the law merchant will govern; if not, then the common-law doctrine relative to assignments must apply.

When a negotiable note secured by a mortgage is transferred to a holder in due course, the question at once arises whether the negotiable character of the note communicates itself to its consort, so as to free the latter from any defects or equities existing at the time of its inception or subsequently arising; or whether the mortgage is required to stand upon its own merits and is subject to all of the defenses and infirmities to which non-negotiable paper is heir. This topic does not lend itself readily to amplification or lengthy discussion. This is by no means due to a paucity of case law upon the subject, but rather to the fact that the question is one of such a categorical nature that there is but little room for a middle ground, and all of the decisions must perforce give an unequivocally affirmative or negative answer.

The Supreme Court of the United States and all of the federal courts have taken the view that a mortgage, when performing the function of acting as security to a negotiable note, borrows from its companion to the extent of rendering itself negotiable also.[1] Indeed, there seems to be not a single decision to mar the harmony of the cases involving this point that have been passed upon by these courts. As for the State courts, the great majority of them have committed themselves to the same view. In fact, a review of the decided cases makes it manifest that the weight of authority is to the effect that a mortgage, when in attendance upon a negotiable note, is likewise to be classed as a negotiable instrument and governed by the established principles of the law merchant as regards antecedent equities.[2] In the recent case of *Robertson* v. *United States Live Stock Co.* (Iowa), 145 N. W. 535, the law was so laid down. The court cited a number of cases as authority for its decision and intimated that the question was so well settled in that State as not to require more than a summary consideration. The courts that take this position reason that the debt, inasmuch as it is the principal thing, is the determining factor, and must be deemed as imparting its characteristics and peculiarities to the mortgage,

[1] Carpenter *v.* Longan, 16 Wall. (U. S.) 271; Swett *v.* Stark, 31 Fed. 858; Hamilton *v.* Fowler, 99 Fed. 18, 40 C. C. A. 47.

[2] Taylor *v.* Page, 88 Mass. 86; Nashville Trust Co. *v.* Smythe, 94 Tenn. 513, 29 S. W. 903, 27 L. R. A. 663; Crawford *v.* C. Aultman & Co., 139 Mo. 262, 40 S. W. 952; Smith *v.* First Nat. Bank, 23 Okla. 411, 104 Pac. 1080, 29 L. R. A. (N. S.) 576.

measuring the rights and remedies of the parties thereunder, rather than that the mortgage should be regarded as fixing the nature of the debt.

Although the weight of authority is to the effect that a mortgage securing a negotiable note is likewise negotiable, the doctrine is by no means universally prevalent. On the contrary, a very respectable number of courts take the opposite view.[3] According to the doctrine laid down by them, the assignee of a mortgage takes it subject to antecedent equities; the fact that it is security to a negotiable note is ineffectual to render it immune to the effects of whatever inherent infirmities it may possess. These courts contend that, even under such circumstances, the mortgage must continue to be controlled by the established principles of the common law, and they deny to negotiable notes the power to alter the essential nature of what is in such case a mere lien by communicating to it their own most distinctive feature. They regard the creditor as having two securities, to either of which he may resort, each, however, retaining its own distinguishing characteristics and remaining subject to its own peculiar equities.[4]

On principle and reason this latter view would seem to be undoubtedly the more defensible one and the one more consonant with the symmetry of the law. The courts that hold a mortgage negotiable under such circumstances appear to overlook, or else to ignore, the strict logic of the situation. As pointed out above, the creditor has two securities, and they are of such different and distinct natures that to hold that the one can be assimilated to and governed by the principles applicable to the other gives rise to a rather singular and incongruous state of affairs. That the two are independent of each other is evidenced by numerous considerations. In the first place, the note gives rise merely to an *in personam* claim, while the mortgage constitutes *in rem* security. The surrender or cancellation of the note does not extinguish the mortgage unless such be the clear and manifest intent of the parties, but operates merely as the relinquishment of the legal remedy on the note itself.[5] Again, the creditor may resort to either se-

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[3] Bailey *v.* Smith, 14 Ohio St. 396, 84 Am. Dec. 385; Watkins *v.* Goessler, 65 Minn. 118, 67 N. W. 796; Buehler *v.* McCormick, 169 Ill. 269, 48 N. E. 287; Equitable Securities Co. *v.* Talbert, 49 La. Ann. 1393, 22 So. 762. This question seems never to have come up for adjudication in Virginia. The case of Evans *v.* Roanoke Savings Bank, 95 Va. 294, 28 S. E. 323, has been cited as showing the temper of the court of that State upon the subject. In this case a deed of trust securing a negotiable note was after assignment fraudulently released on the margin of the deed book by the original beneficiary. Such an act, however, did not give rise to an equity within the legitimate meaning of that term, as employed with reference to negotiable paper, but served rather to effect an extinguishment of the lien as to subsequent creditors and purchasers by force of a statute.

[4] Thayer *v.* Mann, 19 Pick. (Mass.) 535; Bailey *v.* Smith, *supra*. See Coles *v.* Withers, 33 Gratt. (Va.) 186, which involved, however, an express vendor's lien as security for a bond.

[5] Coles *v.* Withers, *supra*.

curity at his option, or to both concurrently, if he so chooses.[6]

Moreover, the mortgage ordinarily remains in full force after the note has become barred by the statute of limitations.[7] In fact, the mortgage is a security for the debt itself rather than for the note; in most cases it is regarded by the creditor as the primary source of security.

The somewhat anomalous state of affairs brought about by the majority of the decisions upon the subject in question would seem to be indicative of a desire on the part of the courts to extend the scope of the law merchant so as to include mortgages when employed to accompany negotiable paper. So to hold makes the law align more closely with commercial usage. Business is ever restive when fettered by restraints, and the law hastens to humor this disposition by giving all possible freedom to the transfer, not only of corporeal property, but likewise of written evidences of indebtedness. That a creditor should exact a mortgage as a sponsor for a negotiable note is in a way suggestive of the fact that the continued solvency of the debtor is not above suspicion. Therefore, it is not inconceivable that, if the mortgage be deemed non-negotiable, its presence might actually handicap the transfer of the note.

In the jurisdictions where the mortgage is held to be negotiable, an interesting question arises where a holder in due course does not proceed against the debtor until after the note has been barred by the statute of limitations. It is held that the negotiability of the mortgage ceases when the note becomes unenforceable by lapse of time.[8] When the mortgage secures several notes maturing at different dates, it has been held that the negotiability of the mortgage determines with the maturity of the note of shortest duration.[9]

Even in those States where the doctrine obtains that the mortgage does not partake of the negotiability of the note, the fact that a holder in due course cannot pursue his remedy on the mortgage because of the existence of equities does not impair his remedy on the note itself.[10] That is to say, the principles governing the transfer of negotiable paper apply in full force to the note, whether there be a mortgage as security thereto or not. This is true, even though the equity set up be that of payment by the mortgagor to the mortgagee.[11] In such an event the lien of the mortgage will be extinguished, but, as to the endorsee of the note, the indebtedness remains unsatisfied.

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[6] Ober *v.* Gallagher, 93 U. S. 199, 23 L. Ed. 829.

[7] Mayer *v.* Mann, *supra.*

[8] Dearman *v.* Trimmier, 26 S. C. 506, 2 S. E. 501.

[9] Abele *v.* McGuigan, 78 Mich. 415, 44 N. W. 393. But, where the notes are transferred to different persons, the rule seems not to apply as to those who take notes that have not matured. See Nashville Trust Co. *v.* Smythe, *supra.*

[10] Towner *v.* McClelland, 110 Ill. 542.

[11] McAuliffe *v.* Reuter, 166 Ill. 491, 46 N. E. 1087; Smith *v.* First Nat. Bank, *supra.*